

Jan 11, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ALEXANDRA E.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL

SECURITY ADMINISTRATION,

Defendant.

No. 1:18-cv-03050-SAB

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT;  
DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 15, and Defendant's Cross-Motion for Summary Judgment, ECF No. 16. The motions were heard without oral argument. Plaintiff is represented by D. James Tree, and Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney David Burdett.

For the reasons set forth below, the Court **grants** Plaintiff's motion, **denies** Defendant's motion, and **reverses** the administrative law judge ("ALJ") decision denying disability benefits.

**Jurisdiction**

On May 30, 2012, Plaintiff filed a Title II application for disability insurance benefits and as well as protectively filed a Title XVI application for supplemental security income. Plaintiff initially alleged an onset date of December 15, 2011, but requested a closed period of disability between May 30, 2012 and December 30,

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1 2015.

2 Plaintiff's application was denied initially and on reconsideration. On  
3 March 24, 2014, Plaintiff appeared and testified at a hearing held in Yakima,  
4 Washington before an ALJ. Kimberly S. Mullinax also participated as a vocational  
5 expert. Plaintiff was represented by Tim Anderson, a non-attorney representative.

6 The ALJ issued a decision on April 24, 2014, finding that Plaintiff was not  
7 disabled. Plaintiff filed a timely appeal with the United States District Court for the  
8 Eastern District of Washington. The Court granted the parties' Stipulated Motion  
9 to Remand. Another hearing was held on July 31, 2017, in Yakima, Washington,  
10 where Plaintiff appeared and testified. Kimberly S. Mullinax also participated as a  
11 vocational expert. Plaintiff was represented by D. James Tree and Tim Anderson.

12 The ALJ issued a decision on December 11, 2017, finding that Plaintiff was  
13 not disabled. Plaintiff filed a timely appeal with the United States District Court for  
14 the Eastern District of Washington on May 5, 2018. The matter is before this Court  
15 under 42 U.S.C. § 405(g).

### 16 **Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any  
18 substantial gainful activity by reason of any medically determinable physical or  
19 mental impairment which can be expected to result in death or which has lasted or  
20 can be expected to last for a continuous period of not less than twelve months." 42  
21 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a disability  
22 only if his impairments are of such severity that the claimant is not only unable to  
23 do his previous work, but cannot, considering claimant's age, education, and work  
24 experiences, engage in any other substantial gainful work which exists in the  
25 national economy. 42 U.S.C. § 1382c(a)(3)(B).

26 The Commissioner has established a five-step sequential evaluation process  
27 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*  
28 *Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
2 § 404.1520(b). Substantial gainful activity is work done for pay and requires  
3 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,  
4 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are  
5 denied. 20 C.F.R. § 404.1520(b). If he is not, the ALJ proceeds to step two.

6 Step 2: Does the claimant have a medically-severe impairment or  
7 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not  
8 have a severe impairment or combination of impairments, the disability claim is  
9 denied. A severe impairment is one that lasted or must be expected to last for at  
10 least 12 months and must be proven through objective medical evidence. 20 C.F.R.  
11 § 404.1509. If the impairment is severe, the evaluation proceeds to the third step.

12 Step 3: Does the claimant's impairment meet or equal one of the listed  
13 impairments acknowledged by the Commissioner to be so severe as to preclude  
14 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.  
15 App. 1. If the impairment meets or equals one of the listed impairments, the  
16 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one  
17 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

18 Before considering Step 4, the ALJ must first determine the claimant's  
19 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual  
20 functional capacity is his ability to do physical and mental work activities on a  
21 sustained basis despite limitations from his impairments.

22 Step 4: Does the impairment prevent the claimant from performing work he  
23 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to  
24 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform  
25 this work, the evaluation proceeds to the fifth and final step.

26 Step 5: Is the claimant able to perform other work in the national economy in  
27 view of his age, education, and work experience? 20 C.F.R. § 404.1520(g).

28 The initial burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th  
2 Cir. 1999). This burden is met once a claimant establishes that a physical or mental  
3 impairment prevents him from engaging in his previous occupation. *Id.* At step five,  
4 the burden shifts to the Commissioner to show that the claimant can perform other  
5 substantial gainful activity. *Id.*

### 6 **Standard of Review**

7 The Commissioner's determination will be set aside only when the ALJ's  
8 findings are based on legal error or are not supported by substantial evidence in the  
9 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing  
10 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
11 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."  
12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial  
13 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
14 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the  
15 ALJ's denial of benefits if the evidence is susceptible to more than one rational  
16 interpretation, one of which supports the decision of the administrative law judge.  
17 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the  
18 entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence  
19 can support either outcome, the court may not substitute its judgment for that of the  
20 ALJ." *Matney*, 981 F.2d at 1019.

21 A decision supported by substantial evidence will be set aside if the proper  
22 legal standards were not applied in weighing the evidence and making the decision.  
23 *Brawner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).  
24 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the  
25 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d  
26 1050, 1055 (9th Cir. 2006).

27 //

### 28 **Statement of Facts**

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1 The facts have been presented in the administrative transcript, the ALJ's  
2 decision, and the briefs to this Court; only the most relevant facts are summarized  
3 here. At the time of the 2017 hearing, Plaintiff was 30 years old. She has three  
4 children and lives with her fiancé. She works part time (12 hrs. a week), serving  
5 food and drinks.

6 Plaintiff has asthma that prevents her from working full time. She has a daily  
7 regime of steroids, inhalers and nebulizer treatments. She also suffers from severe  
8 obesity and significant allergies, including animals, dust, trees, and weeds.

### 9 **The ALJ's Findings**

10 At step one, the ALJ found Plaintiff engaged in substantial gainful activity  
11 between January 1, 2012 and May 28, 2012, but found there has been a continuous  
12 12-month period in which Plaintiff did not engage in substantial gainful activity.  
13 AR 649.

14 At step two, the ALJ found Plaintiff has the following severe impairments:  
15 asthma and obesity. AR 650.

16 At step three, the ALJ found that Plaintiff's impairments or combination of  
17 impairments do not meet or medically equal any Listing. AR 651. Specifically, the  
18 ALJ considered the severity of Plaintiff's obesity and concluded that Plaintiff's  
19 obesity, either alone or in combination with her other impairments was not of  
20 listing-level severity, given Plaintiff's significant weight loss. AR 651. The ALJ  
21 also found that Plaintiff's asthma did not meet the old listing 3.03B. AR 654.

22 The ALJ concluded that Plaintiff has the residual functional capacity to  
23 perform

24 A full range of light work as defined in 20 C.F.R. 404.1567(b) and  
25 416.967(b) with the exception that she can only perform job tasks  
26 requiring no more than frequent exposure to extreme cold, extreme  
27 heat, high humidity and atmospheric conditions, as these terms are  
28 defined by the Dictionary of Occupational Titles (DOT).

1 AR 654. At step four, the ALJ found that Plaintiff is capable of performing past  
2 relevant work as a general clerk and hotel clerk. AR 661.

3 In the alternative, at step five, the ALJ found Plaintiff was not disabled on  
4 the basis that she could perform other work that exists in significant numbers in the  
5 national economy, including positions such as cashier II. AR 662.

### 6 **Issues for Review**

- 7 1. Whether Plaintiff meets Listing 3.03(B)?

### 8 **Discussion**

9 The ALJ erred in concluding that Plaintiff does not meet the old Listing  
10 3.03(B)<sup>1</sup> because this conclusion is not supported by substantial evidence in the  
11 record.

12 Old Listing 3.03 sets forth the requirements to meet the Asthma Listing:

13 3.03 Asthma. With:

14 A. Chronic asthmatic bronchitis. Evaluate under the criteria for  
15 chronic obstructive pulmonary disease in 3.02A;

16 Or

17 B. Attacks (as defined in 3.00C)<sup>2</sup>, in spite of prescribed treatment and  
requiring physician intervention, occurring at least once every 2

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18 <sup>1</sup> The Social Security Administration revised Listing 3.03 effective October 7, 2016.  
19 The application Listing 3.03 was the Listing in effect for the closed period of May  
20 2012 through December 2015.

21 <sup>2</sup> C. Episodic respiratory disease. When a respiratory impairment is episodic in  
22 nature, as can occur with exacerbations of asthma, cystic fibrosis, bronchiectasis,  
23 or chronic asthmatic bronchitis, the frequency and intensity of episodes that occur  
24 despite prescribed treatment are often the major criteria for determining the level of  
25 impairment. Documentation for these exacerbations should include available  
26 hospital, emergency facility and/or physician records indicating the dates of  
27 treatment; clinical and laboratory findings on presentation, such as the results of  
28 spirometry and arterial blood gas studies (ABGS); the treatment administered; the  
time period required for treatment; and the clinical response. Attacks of asthma,  
episodes of bronchitis or pneumonia or hemoptysis (more than blood-streaked  
sputum), or respiratory failure as referred to in paragraph B of 3.03, 3.04, and 3.07,  
are defined as prolonged symptomatic episodes lasting one or more days and

1 months or at least six times a year. Each in-patient hospitalization for  
2 longer than 24 hours for control of asthma counts as two attacks, and  
3 an evaluation period of at least 12 consecutive months must be used to  
determine the frequency of attacks.

4 20 C.F.R. 404, Subpt. P, App. 1, 3.03 (2015).

5 Here, the record demonstrates that Plaintiff required physician  
6 intervention sufficient to meet the Listing. She needed physician intervention  
7 in May 2012, July 2012, August 2012, December 2012, January 2013,  
8 February 2013, May 2013, September 2013, November 2013, December  
9 2013, March 2014, April 2014, June, 2014, October 2015, and November  
10 2015. In February, 2013, she stayed in the hospital the 8th through the 10th.  
11 In November, 2013, she was in the hospital the 7th through the 9th.

12 Notably, the ALJ erred in failing to consider Plaintiff's asthma  
13 episodes that required physician intervention for 2014 and 2015. It also erred  
14 by finding that Plaintiff was not fully in compliance with treatment because  
15 she was living with her grandmother, who smoked and owned dogs. The  
16 record demonstrates that Plaintiff wanted to move but she did not have the  
17 financial resources to do so and she stayed in the basement to keep away  
18 from the smoke and dogs. Also, even if she were to spend less time in the  
19 house, she had severe allergies, including dust, weeds and trees, so there was  
20 no way to avoid triggers that existed both inside and outside of the home. The  
21 record does not support the ALJ's conclusion that this was willful failure to  
22

23 requiring intensive treatment, such as intravenous bronchodilator or antibiotic  
24 administration or prolonged inhalational bronchodilator therapy in a hospital,  
25 emergency room or equivalent setting. Hospital admissions are defined as inpatient  
26 hospitalizations for longer than 24 hours. The medical evidence must also include  
27 information documenting adherence to a prescribed regimen of treatment as well as  
28 a description of physical signs. For asthma, the medical evidence should include  
spirometric results obtained between attacks that document the presence of  
baseline airflow obstruction. 20 C.F.R. 404, Subpt. P, App. 1, 3.00(C) (2015).

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1 follow prescribed treatment. Moreover, the ALJ's further attempts to  
2 discount Plaintiff's treatment compliance are not supported by the record.

3 **Conclusion**

4 Because the record clearly establishes that Plaintiff meets Listing 3.03(B), a  
5 remand for an award of benefits is necessary. *See Lester v. Chater*, 81 F.13d 821,  
6 828 (9th Cir. 1995) ("Claimants are conclusively disabled if their condition either  
7 meets or equals a listed impairment.").

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **GRANTED**.

10 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **DENIED**.

11 3. The decision of the Commissioner denying benefits is **reversed** and  
12 **remanded** for an award of benefits, with a closed disability period between May  
13 30, 2012 and December 30, 2015.

14 4. The District Court Executive is directed to enter judgment in favor of  
15 Plaintiff and against Defendant.

16 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
17 file this Order, provide copies to counsel, and close the file.

18 **DATED** this 11th day of January 2019.



23  
24

A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive, flowing style.

25 Stanley A. Bastian  
26 United States District Judge  
27  
28